Global Indian Education Sdn Bhd v Neeta's Herbal International Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC) (W)-938–05 OF 2014
ALIZATUL KHAIR, LIM YEE LAN AND NALLINI PATHMANATHAN JJCA
20 JULY 2016

Civil Procedure — Disposal of case — Disposal of action without trial — Facts in dispute — Whether plaintiff framed any question of law or specific issues for determination — Whether there were serious questions of fact disputed between parties — Whether this was fit and proper case to be summarily determined under O 14A — Estoppel — Tenancy agreement — Whether defendant estopped from challenging validity of the plaintiff's notice to deliver vacant possession having paid increased rental — Appeal — Interference by appellate court — Whether trial judge misdirected himself in law in disposing of matter by way of O 14A

Neeta's Herbal International Sdn Bhd ('the plaintiff') was at all material times the legal owner of nine lots of land in Kuala Lumpur with eight units of double-storey semi-detached bungalows erected thereon ('the property'). On 19 November 2005, the plaintiff had entered into a tenancy agreement with Global Indian Education Sdn Bhd ('the defendant'). The main tenancy agreement read together with a supplementary agreement, dated 3 June 2008, provided, that the plaintiff/landlord would let the property to the defendant/tenant for a three year period, ie from 19 November 2005–18 November 2008, at the agreed rental of RM40,000 per month. When the tenancy agreement expired, the parties entered into another tenancy agreement ('the second tenancy agreement') wherein they agreed to renew the tenancy of the property for a further period of three years, ie from 20 January 2009–19 January 2012, at the agreed rental of RM46,000. At the same time, by section 7(ii) of the Third Schedule of the second tenancy agreement ('section 7(ii)') the parties agreed that the tenancy was liable to be terminated when the plaintiff was desirous of selling the property. Section 7(ii) provided that if the plaintiff decided to sell, the defendant would be given the first option to purchase the property at the price offered by a prospective purchaser, and that if the defendant refused to purchase the property, the offer would be given to any other party who could meet the offer price, with the plaintiff giving six months' notice to the defendant. When the plaintiff received an offer from a prospective purchaser to purchase the property for the sum of RM35,784,320, it notified the defendant in writing of its intention to sell the property. Although the defendant was offered the first option to purchase the property, it decided not to exercise this option. On 9 May 2012, the plaintiff entered into a sale and

purchase agreement ('the SPA') with the prospective purchaser to sell the property to the latter for the consideration of RM35,784,320. By a letter dated 10 May 2012, the plaintiff notified the defendant of the same and gave it six months' notice to vacate the property, ie to vacate on or before 9 November 2012. The plaintiff also notified the defendant that if it failed to deliver vacant possession of the property within the six month period, the rental of the premises would be increased by 15% ie to RM60,833 and that this increased rental would have to be paid for the ensuing six months, ie from 9 November 2012–9 May 2013, as per the terms of the second tenancy agreement. When the defendant failed to vacate the property at the expiry of the six month period, the plaintiff notified the defendant that the latter would now be liable to pay the new rental sum of RM60,833. Subsequently the defendant wrote to the plaintiff denying it had failed to deliver vacant possession of the property by 9 November 2012 and disputing that it was required to deliver vacant possession of the property on 9 May 2013. Consequently, the plaintiff filed an action against the defendant seeking, inter alia, a declaration that the second tenancy agreement had been validly terminated and an order that the defendant pay the plaintiff double rental at the rate of RM121,670 from 10 May 2013 to the date of actual delivery of vacant possession. In its defence the defendant claimed that it had a valid right to occupy the property because the tenancy agreement continued to remain valid until 17 January 2018. The defendant thus counterclaimed seeking inter alia a declaration that the tenancy agreement between the plaintiff and the defendant was still valid and subsisting until 17 January 2018, a declaration that it was permitted to occupy the property until expiry of the tenancy agreement on 17 January 2018, a declaration that the plaintiff should compensate the defendant if it wished it to vacate the property before that date and damages. The plaintiff then filed an application under O 14A of the Rules of Court 2012 ('the ROC') on the grounds that the material facts were not in dispute and the issues to be determined in this case involved the construction of the tenancy agreements together with the law on estoppel. The defendant objected to the application. However, the trial judge allowed the plaintiff's application under O14A of the ROC and entered judgment for the plaintiff. This was the defendant's appeal against that decision. The defendant submitted that the plaintiff had not framed any question of law or specific question on the construction of the tenancy agreements for the court's consideration. The defendant also submitted that there were serious questions of fact disputed between the parties.

Held, dismissing the appeal and the defendant's counterclaim with costs of RM10,000:

(1) It was clear from a perusal of the plaintiff's application under O 14A of the ROC 2012 that the plaintiff was seeking construction of section 7(ii) of the Third Schedule of the second tenancy agreement, the SPA dated

9 May 2012 and the relevant correspondence between the parties in relation to the delivery of vacant possession of the property. Thus, the defendant was incorrect in saying that the plaintiff had not framed any question of law or specific question on the construction of the tenancy agreements for the court's consideration. Such construction necessarily involved a consideration of the undisputed facts as an O 14A application could not be utilised parts of an agreement without a consideration of the salient facts. However, in the present case where the facts were clearly not in dispute, it was incorrect to say that the remedy could not be utilised (see paras 27–29).

(2) The defendant's argument that there were serious questions of fact disputed between the parties was also without merit. As correctly pointed out by the trial judge, the date of commencement of the principal tenancy agreement had been amended vide the supplementary agreement, which had been implemented by both parties (see paras 31–33).

(3) The other issues raised as disputes of fact by the defendant, such as challenging the SPA and the date of delivery of vacant possession of the property were in effect not issues of fact. Those issues arose from the construction of section 7(ii), which had been meticulously examined by the trial judge before he concluded that the terms and conditions of section 7(ii) had been duly complied with by the plaintiff. The defendant had received due notification of the plaintiff's intention to sell the property and had also received first option to purchase the property. However, in its reply the defendant had expressed its intention not to exercise the option to purchase the property at the offered price. Subsequently the plaintiff had entered into the SPA and given the defendant a six month notice to vacate the property or pay an increased rental of RM60,835 for the ensuing six months. The defendant had also been furnished with a duly executed and stamped copy of the SPA. In the light of these events the trial judge was not wrong in concluding that the plaintiff had complied with the terms of section 7(ii) and could not be portrayed as having signed the SPA with the intention of chasing the defendant out of the premises before the lapse of the tenancy period. If the defendant chose not to exercise its option to first purchase the property as it had clearly and unequivocally stated in its letter to the plaintiff, then the mechanism set out in section 7(ii) leading to the eventual dispossession of the property and termination of the tenancy agreement would be triggered. As such, there were no substantial issues of fact that were disputed and the trial judge had not misdirected himself in law in disposing of this matter by way of O 14A (see paras 34–47 & 57–58).

(4) On the issue of estoppel, having agreed to and after having paid the 15% increase in rental of the property, the defendant was estopped from challenging the validity of the plaintiff's notice to the defendant to deliver vacant possession (see paras 52–53).

(5) There was no merit in the defendant's averment that the SPA was not lawfully made because the property was still registered in the name of the plaintiff. As explained by the plaintiff, the property was still registered in the name of the plaintiff because the plaintiff had been unable to deliver vacant possession of the property to the prospective purchaser. Thus, there was no reason to disagree with the finding of the trial judge that the defendant's failure to vacate the property had occasioned a loss to the plaintiff, which had to be accounted for by the defendant (see paras 54–56).

(6) Upon the determination of the questions on the construction of the relevant clauses of the tenancy agreement and on the issue of estoppel, it followed that the counterclaim could no longer subsist (see para 59).

[Bahasa Malaysia summary

Neeta's Herbal International Sdn Bhd ('plaintif') adalah pada setiap masa matan pemilik sah sembilan lot tanah di Kuala Lumpur dengan lapan unit banglo berkembar dua tingkat yang dibina atasnya ('hartanah'). Pada 19 November 2005, plaintif telah memasuki perjanjian penyewaan dengan Global Indoan Education Sdn Bhd ('defendan'). Perjanjian penyewaan utama dibaca bersama dengan perjanjian tambahan, bertarikh 3 Jun 2008, memperuntukkan, bahawa plaintif/tuan tanah akan menyewa hartanah itu kepada defendan/penyewa untuk tempoh tiga tahun, iaitu dari 19 November 2005–18 November 2008, pada sewa yang dipersetujui RM40,00 setiap bulan. Apabila perjanjian penyewaan itu luput, pihak-pihak telah memasuki satu lagi perjanjian peyewaan ('perjanjian penyewaan kedua') di mana mereka bersetuju untuk memperbaharui penyewaan hartanah itu untuk tempoh tiga tahun selanjutnya iaitu, 20 Januari 2009–19 Januari 2012, pada sewa yang dipersetujui RM46,000. Pada masa sama, melalui seksyen 7(ii) Jadual Ketiga perjanjian penyewaan kedua ('seksyen 7(ii)') pihak-pihak telah bersetuju bahawa penyewaan itu boleh ditamatkan apabila plaintif berhasrat untuk menjual hartanah itu. Seksyen 7(ii) memperuntukkan bahawa jika plaintif bersetuju untuk menjual, defendan akan diberikan pilihan pertama untuk membeli hartanah itu pada harga yang ditawarkan oleh bakal pembeli, dan bahawa jika defendan enggan membeli hartanah itu, tawaran itu akan diberikan kepada mana-mana pihak lain yang boleh bersetuju dengan harga tawaran itu, di mana plaintif memberikan notis enam bulan kepada defendan. Apabila plaintif menerima tawaran daripada bakal pembeli untuk membeli hartanah itu berjumlah RM35,784,320, ia memberitahu defendan secara bertulis tentang niatnya untuk menjual hartanah itu. Walaupun defendan menawarkan pilihan pertama untuk membeli hartanah itu, ia memutuskan

untuk tidak menggunakan pilihan ini. Pada 9 Mei 2012, plaintif memasuki perjanjian jual beli ('PJB') dengan bakal pembeli untuk menjual hartanah kepada bakal pembeli dengan balasan RM35,784,320. Melalui surat bertarikh 10 Mei 2012, plaintif memberitahu defendan yang sama dan memberikannya notis enam bulan untuk mengosong hartanah itu iaitu untuk mengosong pada atau sebelum 9 November 2012. Plaintif juga memberitahu defendan bahawa jika ia gagal untuk menyerahkan milikan kosong pada tempoh luput enam bulan, plaintif telah memberitahu defendan bahawa defendan kini bertanggungjawab untuk membayar jumlah sewa baru RM60,833. Berikutan itu defendan telah menulis kepada plaintif menafikan ia telah gagal untuk menyerahkan milikan kosong hartanah itu pada 9 November 2012 dan mempertikaikan bahawa ia dikehendaki menyerahkan milikan kosong hartanah itu pada 9 Mei 2013. Akibat itu, plaintif memfailkan tindakan terhadap defendan memohon, antara lain, deklarasi bahawa perjanjian penyewaan kedua telah ditamatkan secara sah dan satu perintah agar defendan membayar plaintif sewa berganda pada kadar RM121,670 dari 10 Mei 2013 hingga tarikh serahan sebenar milikan kosong itu. Dalam pembelaannya defendan mendakwa bahawa ia mempunyai hak sah untuk mendiami hartanah itu kerana perjanjian penyewaan itu berterusan kekal sah sehingga 17 Januari 2018. Defendan oleh itu telah menuntut balas memohon, antara lain, satu deklarasi bahawa perjanjian penyewaan antara plaintif dan defendan masih sah dan kekal sehingga 17 Januari 2018, satu deklarasi bahawa ia dibenarkan untuk mendiami hartanah itu sehingga luput perjanjian penyewaan pada 17 Januari 2018, satu deklarasi bahawa plaintif patut memberi pampasan kepada defendan jika ia berhasrat untuk mengosongkan hartanah itu sebelum tarikh tersebut dan ganti rugi. Plaintif kemudian telah memfailkan permohonan di bawah A 14A Kaedah-Kaedah Mahkamah 2012 ('KM') atas alasan bahawa fakta material tidak dipertikaikan dan isu-isu untuk ditentukan dalam kes ini melibatkan pembentukan perjanjian penyewaan bersama undang-undang berhubung estopel. Defendan telah membantah permohonan itu. Walau bagaimanapun, hakim perbicaraan telah membenarkan permohonan plaintif di bawah A 14A KM dan memasuki penghakiman untuk plaintif. Ini adalah rayuan defendan terhadap keputusan tersebut. Defendan berhujah bahawa plaintif tidak membuat apa-apa persoalan undang-undang atau soalan spesifik berhubung pembentukan perjanjian penyewaan untk pertimbangan mahkamah. Defendan juga berhujah bahawa terdapat persoalan fakta serius yang dipertikaikan antara pihak-pihak.

Diputuskan, menolak rayuan dan menuntut balas defendan dengan kos RM10,000:

(1) Ia jelas daripada penelitian permohonan plaintif di bawah A 14A KM 2012 bahawa plaintif memohon pembentukan seksyen 7(ii) Jadual Ketiga perjanjian penyewaan kedua, PJB bertarikh 9 Mei 2012 dan hubungan relevan antara pihak-pihak berkaitan serahan milikan kosong

hartanah itu. Oleh itu, defendan tidak betul dalam menyatakan bahawa plaintif tidak membuat apa-apa persoalan undang-undang atau soalan spesifik berhubung pembentukan perjanjian penyewaan itu untuk pertimbangan mahkamah. Pembentukan sedemikian semestinya melibatkan pertimbangan fakta yang tidak dipertikaikan kerana permohonan A 14A tidak boleh menggunakan sebahagian perjanjian tanpa pertimbangan fakta penting. Walau bagaimanapun, dalam kes ini di mana fakta jelas tidak dipertikaikan, ia tidak betul untuk menyatakan bahawa remedi tidak boleh digunakan (lihat perenggan 27–29).

(2) Hujah defendan bahawa terdapat persoalan fakta serius yang dipertikaikan antara pihak-pihak juga tanpa merit. Sepertimana diutarakan dengan wajar oleh hakim perbicaraan, tarikh mula perjanjian penyewaan utama itu telah dipinda melalui perjanjian tambahan, yang telahpun dilaksanakan oleh kedua-dua pihak (lihat perenggan 31–33).

(3) Isu-isu lain sebagai pertikaian fakta oleh defendan, seperti mencabar PJB dan tarikh serahan milikan kosong hartanah pada hal bukan isu-isu fakta. Isu-isu tersebut telah timbul daripada pembentukan seksyen 7(ii), yang telah diperiksa dengan teliti oleh hakim perbicaraan sebelum beliau memutuskan bahawa terma dan syarat seksyen 7(ii) telahpun dipatuhi oleh plaintif. Defendan telah menerima notifikasi tentang niat plaintif untuk menjual hartanah itu dan juga menerima pilihan pertama untuk membeli hartanah itu. Walau bagaimanapun, dalam jawapannya defendan telah menyatakan niatnya untuk tidak menggunakan pilihan untuk membeli hartanah pada harga yang ditawarkan. Berikutan itu plaintif telah memasuki PJB dan memberikan defendan notis enam bulan untuk mengosongkan hartanah itu atau membayar sewa lebih tinggi RM60,835 untuk enam bulan berikutnya. Defendan juga telah diberikan PJB yang telah disempurnakan dan sistem salinannya. Berdasarkan kejadian tersebut hakim perbicaraan tidak salah dalam memutuskan bahawa plaintif telah mematuhi terma seksyen 7(ii) dan tidak boleh dilihat sebagai telah menandatangani PJB dengan niat menghalau defendan keluar dari premis itu sebelum luput tempoh penyewaan. Jika defendan memilih untuk tidak menggunakan pilihannya untuk menjadi yang pertama membeli hartanah itu kerana ia dengan jelas dan tidak berbelah dinyatakan dalam suratnya kepada plaintif, maka mekanisme yang dinyatakan dalam seksyen 7(ii) membawa kepada akhirnya perampasan hartanah dan penamatan perjanjian penyewaan yang akan tercetus. Oleh itu, tidak ada isu-isu besar berhubung fakta yang dipertikaikan dan hakim perbicaraan telah tidak tersalah arah dalam undang-undang dalam menyelesaikan perkara ini melalui A 14A (lihat perenggan 34–47 & 57–58).

(4) Berhubung isu estopel, setelah bersetuju kepada dan selepas membayar 15% peningkatan sewa hartanah itu, defendan diestopkan daripada

mencabar kesahan notis plaintif kepada defendan untuk menyerahkan milikan kosong (lihat perenggan 52–53).

(5) Tiada merit dalam hujah defendan bahawa PJB tidak dibuat secara sah kerana hartanah itu masih berdaftar atas nama plaintif. Sepertimana dijelaskan oleh plaintif, hartanah itu masih berdaftar atas nama plaintif kerana plaintif tidak dapat menyerahkan milikan kosong hartanah itu kepada bakal pembeli. Oleh itu, tiada sebab untuk tidak bersetuju dengan penemuan hakim perbicaraan bahawa kegagalan defendan untuk mengosongkan hartanah itu telah menyebabkan kerugian kepada plaintif, yang perlu ditanggung oleh defendan (lihat perenggan 54–56).

(6) Setelah menentukan persoalan berhubung pembentukan fasal-fasal relevan untuk perjanjian penyewaan dan berhubung isu estopel, ia diikuti bahawa tuntutan balas tidak boleh lagi kekal (lihat perenggan 59).]

Notes

For cases on disposal of case in general, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3276–3281.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals [2014] 6 MLJ 31; [2014] 5 AMR 285, FC (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)

Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299, FC (refd)

Legislation referred to

Rules of Court 2012 O 14A

Appeal from: Suit No 22NCVC-418–06 of 2013 (High Court, Kuala Lumpur)

Harpal Singh Grewal (Julian Chan with him) (AJ Ariffin, Yeo & Harpal) for the appellant.

Jadadish Chandra (Arbain & Co) for the respondent.

Alizatul Khair JCA:

INTRODUCTION

[1] This is an appeal by the appellant, Global Indian Education Sdn Bhd ('the defendant in the High Court') against the decision of the High Court at Kuala Lumpur whereby the learned judge had allowed the respondent's ('the plaintiff in the High Court') application under O 14A and entered judgment for the plaintiff accordingly on the following terms:

(i) Perjanjian Penyewaan Kedua bertarikh 20.1.2009 telah ditamatkan secara sah oleh Plaintif;

(ii) Defendan adalah bertanggung jawab untuk meninggalkan dan menyerahkan milikan kosong Hartanah berikut kepada Plaintif pada 9.5.2013:

(a) GRN 4530 Lot 219 Seksyen 0095;

(b) GRN 4531 Lot 219 Seksyen 0095;

(c) GRN 4532 Lot 219 Seksyen 0095;

(d) GRN 4533 Lot 219 Seksyen 0095;

(e) GRN 4534 Lot 219 Seksyen 0095;

(f) GRN 4535 Lot 219 Seksyen 0095;

(g) GRN 4536 Lot 219 Seksyen 0095;

(h) GRN 4537 Lot 219 Seksyen 0095;

(i) GRN 37147 Lot 219 Seksyen 0095;

(iii) Defendan dan/atau pekerja dan/atau ejen atau bagaimanapun meninggalkan dan menyerahkan milikan kosong hartanah tersebut kepada Plaintif dalam tempoh 1 bulan dari tarikh penerimaan Perintah termeterai;

(iv) Defendan membayar Plaintif sewa berganda (mesne profit) pada kadar RM131,670 daripada 10.5.2013 sampai tarikh penyerahan milikan kosong;

(v) Ganti rugi ditaksirkan oleh Penolong Kanan Pendaftar pada suatu tarikh yang akan ditetapkan oleh Mahkamah dan dibayar serta-merta oleh Defendan bersama faedah diatasnya pada kadar 5% setahun dari 10.5.2013 sehingga tarikh penyelesaian penuh.

[2] We heard the appeal and at the conclusion of the hearing we unanimously dismissed it with costs of RM10,000 to the respondent (the

plaintiff in the High Court). We now give our reasons for our decision. We shall be referring to parties in this judgment as they were referred to in the High Court.

BACKGROUND AND CHRONOLOGY OF EVENTS

[3] The plaintiff is the legal and registered owner of all that land held under GRN 4530 Lot 219, GRN 4531 Lot 220, GRN 4532 Lot 221, GRN 4533 Lot 222, GRN 4534 Lot 223, GRN 4535 Lot 224, GRN 4536 Lot 225, GRN 4537 Lot 226 and GRN 37147 Lot 227 all in Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan together with eight units of double storey semi detached bungalows erected thereon ('the said property').

[4] By a tenancy agreement dated 19 November 2005 ('the principal tenancy agreement') read together with a supplementary agreement dated 3 June 2008 ('the supplementary agreement'), the plaintiff as the landlord let and the defendant as the tenant agreed to take the tenancy of the said property for a period of three years commencing from 19 November 2005–18 November 2008 at the agreed rental of RM40,000 per month.

[5] Upon the expiry of the principal tenancy agreement the tenancy of the said property was renewed for a further period of three years commencing from 20 January 2009 and expiring on 19 January 2012 at the agreed rental of RM46,000 per month ('the second tenancy agreement').

[6] By section 7(ii) of the Third Schedule of the second tenancy agreement, ('the said section 7(ii)') it was an agreed term of the tenancy that the tenancy was liable to be terminated in the event that the plaintiff was desirous of selling the said property. In such a situation the defendant would be given the first option in writing, valid for fourteen working days, to purchase the said property at the price offered by the prospective purchaser. Should the defendant refuse to purchase the said property for whatever reasons, the offer shall be given to any party that may meet the price offered.

The said section 7(ii) further provides that in the event the plaintiff decides to sell the said property, the plaintiff will give six months notice to the defendant and as soon as practical forward a copy of the sale and purchase agreement to the defendant's solicitors.

[7] The defendant shall continue paying the rental at the prevailing rate for the first six months of the notice and thereafter for the remaining six months or part thereof, pay to the plaintiff rental at a rate not exceeding 15% the prevailing rental.

[8] By letter dated 21 September 2011 the plaintiff notified the defendant of the plaintiff's intention to sell the said property and in accordance with section 7(ii) of the Third Schedule of the second tenancy agreement notified the defendant that the plaintiff had received an offer from a prospective purchaser to purchase the said property for the sum of RM35,784,320 ('the offered price') and that pursuant to article 9.01(iii) of the second tenancy agreement, effective from 1 November 2011 the rental would be revised by an increase of 15% to RM52,900 per month.

[9] Vide letter dated 6 October 2011, the defendants through their solicitors Messrs Jeff Leong, Poon & Wong notified the plaintiff's solicitors that the defendant did not wish to purchase the said property at the offered price and stating in no uncertain terms that 'your client is free to offer the Premises to the prospective purchaser at the offered price'.

[10] The defendant's solicitors reminded the plaintiff of its obligation under the said section 7(ii) and requested for a copy of the sale and purchase agreement between the plaintiff and the prospective purchaser at the offered price. The obligation referred to by the defendant's solicitors reads thus:

> ... and the landlord shall guarantee to the tenant by making a pre condition in their sale and purchase agreement which the prospective buyer will comply with the additional six months extension.

[11] On 9 May 2012 the plaintiff entered into a sale and purchase agreement with LSS Academy Sdn Bhd to sell the said property to the latter for the consideration of RM35,784,320. The defendant was given six months notice to vacate the said property.

[12] By letter dated 10 May 2012, the plaintiff's solicitors, in compliance with the said section 7(ii) notified the defendant's solicitors of the same and further informed the defendant that pursuant to the said section the defendant was given six months notice to vacate the said property. A copy of the duly stamped sale and purchase agreement dated 9 May 2012 was also enclosed.

The plaintiff was further notified that in the event vacant possession was not delivered within the six months period, rental at a rate not exceeding 15% of the prevailing rental, that is RM52,900 plus RM7,935 totalling RM60,833 was to be paid for the ensuing six months (see p 178 of ROA, Vol 2(2)).

[13] The defendant did not vacate the said property at the expiry of six months ie by 9 November 2012. The plaintiff's solicitors accordingly notified the defendant vide letter dated 16 November 2012 that the plaintiff was now

liable to pay the new rental of RM60,835 for the ensuing six months. The plaintiff further notified the defendant that it would not grant any further extension after 9 May 2013.

[14] On 10 April 2013, the defendant's solicitors wrote to the plaintiff denying that the defendant had failed to deliver vacant possession of the said property by 9 November 2012 and disputing that vacant possession of the said property should be surrendered on 9 May 2013. The defendant instead alleged, for the first time, that based on the agreed terms the tenancy expires on 19 January 2015 (pp 182–183, ROA, Vol 2(2)).

[15] The defendant failed to deliver vacant possession of the said property by 9 May 2013.

[16] The plaintiff then filed this action in the High Court on 27 June 2013 seeking a declaration that the second tenancy agreement dated 20 January 2009 had been validly terminated by the plaintiff; a declaration that the defendant is liable to quit and deliver vacant possession of the said property, and an order that the defendant pay the plaintiff double rental (mesne profits) at the rate of RM121,670 from 10 May 2013 to date of actual delivery of vacant possession.

[17] The defendant, on the other hand contended that the tenancy agreement continued to remain valid until 17 January 2018 and the defendant had a valid right to occupy the said property as tenants until the said date. The defendant filed a counterclaim alleging that the measures that have been taken by the plaintiff to terminate the said tenancy agreement entered into with the defendant was done in bad faith.

[18] In their counterclaim the defendant sought the following declarations:

(a) that the tenancy agreement between the plaintiff and the defendant is still valid and subsisting until 17 January 2018;

(b) the defendant will only vacate the property after the expiry of the tenancy agreement and until such time the plaintiff is not entitled to ask the defendant to vacate the property or terminate the said tenancy agreement;

(c) a declaration that the defendant is permitted to occupy the property until the expiry of the tenancy agreement which is until 17 January 2018; and

(d) a declaration that in the event the plaintiff wishes the defendant to vacate the property before the expiry of the tenancy agreement then the plaintiff must compensate the defendant.

The defendant also sought for general and exemplary damages.

ENCLOSURE 7

[19] The plaintiff filed an application under O 14A of the Rules of Court 2012 ('the ROC 2012') vide encl 7 for the court to dispose of the action by a determination on a question of law and/or construction of documents. It was the plaintiff's contention that this is a fit and proper case to be disposed of under O14A of the ROC 2012 as the material facts were not in dispute and the only issue to be determined involves the construction of documents namely the two tenancy agreements together with the law on estoppel.

DECISION OF THE HIGH COURT

[20] As stated earlier, the learned judge allowed the plaintiff's application in encl 7 having found, inter alia, as follows:

> ... saya mendapati kes ini hanya melibatkan pentafsiran perjanjian-perjanjian penyewaan dan perjanjian tambahan, dan pertimbangan mengenai surat-menyurat antara pihak-pihak yang menggambarkan pelakuan mereka untuk melihat sama ada wujud isu mengenai estoppel.

The learned judge also found that:

> ... perkara-perkara yang dikemukakan oleh plaintif dalam lampiran 7 adalah sesuai bagi penentuan melalui Aturan 14A KKM 2012 dan ... Fakta yang dinyatakan dalam pliding dan keterangan afidavit kedua-dua pihak yang dikemukakan adalah mencukupi bagi saya membuat penentuan yang muktamad keseluruhan kes dan saya juga telah mengenal pasti fakta-fakta material yang secara nyata tidak dipertikaikan atau yang tidak sepatutnya dipertikaikan.

THE APPEAL

[21] Before us learned counsel for the defendant raised two issues:

(a) there was no question of law framed or specific question on the construction of the tenancy agreements forwarded by the plaintiff to the court for consideration; and

(b) there are serious questions of facts disputed between the parties.

THE LAW

[22] The question of law and the question for construction of documents put forward by the plaintiff in their application were as follows:

(a) *atas pentafsiran sebenar seksyen 7(ii)* dibaca bersama dengan surat peguam cara plaintif bertarikh 21.9.2011 dan surat balasan peguam cara defendan bertarikh 6.10.2011, plaintif bebas untuk menjualkan hartanah tersebut

bagi balasan sebanyak RM35,784,320;

(b) *atas pentafsiran sebenar perjanjian jual beli bertarikh 9.5.2012* yang dibuat antara plaintif dengan LSS Academy Sdn Bhd dibaca bersama dengan surat peguam cara plaintif bertarikh 10.5.2012, defendan telah dikehendaki untuk mengosongkan hartanah tersebut dalam masa 6 bulan jika tidak suatu sewa bersamaan dengan15% lebih daripada sewa pasaran semasa, iaitu RM52,900.00 dan RM7,935 berjumlah RM60,835 harus dibayar untuk 6 bulan yang berikutnya;

(c) *atas pentafsiran sebenar seksyen 7(ii) dibaca bersama dengan surat-surat peguam cara plaintif bertarikh 16.11.2012 dan 15.4.2013*, defendan dikehendaki menyerahkan milikan kosong hartanah tersebut pada atau sebelum 9.5.2013;

(d) *bahawa defendan*, dengan membayar sewa yang dikemaskinikan sebanyak RM60,835 bermula 1.11.2012 dan berterusan adalah *kini diestop* daripada *mempertikaikan tarikh bagi menyerahkan milikan* kosong *pada 9.5.2013* dan/atau bahawa penyewaan tersebut berterusan sehingga 17.1.2018.

[23] Order 14A of the ROC 2012 reads as follows:

(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

[24] The law on the scope of O 14A is well settled. An application under O 14A is inappropriate if there are conflicting allegations of fact. Order 14A cannot be invoked on the basis of assumed facts. The court ought not to give a ruling under O 14A in *vacuo* on the basis of hypothetical facts. In *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299 the Federal Court opined as follows:

> It is trite law that O 14A of the Rules of the High Court 1980 may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812). Where the issues of fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so would in effect be to give rulings in vacuo or on a hypothetical ruling, which the court will not do (see

State of Bank of India v Mariani Marketing 1 March 1991, CA Transcript No 91/0304).

[25] The Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337 laid down some of the relevant factors which the court should consider in dealing with an application under O 14A. As observed by the Court of Appeal:

> ... In our view even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O 14A and O 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. *Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed* and then to apply the relevant rule to the facts as found.
>
> It is my view that O 14A gives leverage to the court to finally determine issues such as questions of law or construction which may finally be determined without the need for a full trial of the action.
>
> On a final note, it might be noted that the O 14A regime is largely put in place to enable courts to effectuate speedy solutions to civil disputes where oral evidence is unnecessary. (Emphasis added.)

[26] Both these cases were affirmed by the Federal Court in the subsequent case of *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31; [2014] 5 AMR 285.

OUR FINDINGS

[27] We will deal with both issues together. As regards the first issue, it is clear from a perusal of the plaintiff's application in encl 7 that the plaintiff was seeking the court's determination on the construction of section 7(ii) of the Third Schedule of the second tenancy agreement dated 20 January 2009; the sale and purchase agreement dated 9 May 2012 and the plaintiff's solicitor's letter dated 21 September 2011, the defendant's solicitor's reply dated 6 October 2011, the plaintiff's solicitor's letters dated 10 May 2012, 16 November 2011 and 15 April 2013. The plaintiff had also raised the issue of estoppel as an issue of law to be determined by the court. It was therefore incorrect to say that there was no specific question of law framed or specific question on the construction of the tenancy agreement forwarded.

[28] Such construction necessarily involves a consideration of the undisputed facts as an O 14A application cannot be utilised to construe parts of an agreement in *vacuo*, as it were, without a consideration of the salient facts.

[29] If those facts were in dispute then it is correct to say that such a summary disposal is unwarranted. But where the facts are clearly not in dispute as in the present case, it is incorrect to say that the remedy cannot be utilised.

[30] As for the second issue, the defendant alleged in their written submission, there are serious dispute of facts involving the following issues:

(a) the defendant contends that the tenancy agreement is valid until 17 January 2018;

(b) whether the supplemental agreement was executed by both parties;

(c) whether the defendant failed to furnish the stamped copy of the sale and purchase agreement dated 9 May 2012 as soon as possible as provided by section 7(iii) of the Third Schedule of the second tenancy agreement;

(d) the defendant is challenging the sale and purchase agreement dated 9 May 2012;

(e) the defendant disputes the date of delivery of vacant possession vide its solicitor's letter dated 10 April 2013;

(f) the defendant disputes that the delivery of vacant possession falls on 9 May 2013; and

(g) the defendant has filed a counterclaim against the plaintiff.

[31] Issue (a) and (b) can be dealt with together. As correctly pointed out by the learned judge, vide the supplemental agreement the date of commencement of the principal tenancy agreement was amended to that of the date of the principal tenancy agreement, which is 19 November 2005 (cl 1, of the supplemental agreement, p 115 of the ROA, Vol 2(1) and section 1 of the First Schedule of the principal tenancy agreement, p 107, ROA, Vol 2(1)).

[32] As the tenancy is for three years, it will expire on 18 November 2008, not 17 January 2008 as alleged (see para 24 of the judgment, p 21 of the supplementary ROA).

[33] As to the question whether the supplemental agreement was implemented by both parties, this contention is entirely without merit as it is undisputed that the defendant had, pursuant to the execution of the supplemental agreement been paying rental of RM40,000 per month in accordance with section 3 of the Third Schedule of the principal agreement.

[34] Issues (c)–(f) are not issues of fact but arise from the construction of section 7(ii) of the Third Schedule of the second tenancy agreement (the said

section 7(ii)) based on the material facts and sequence of events set out earlier in the judgment, which as we have seen are primarily undisputed. A

[35] In this regard, we find that the learned judge had meticulously examined the said section 7(ii) and based on the undisputed facts as reflected in the letters exchanged between the parties and the affidavits filed therein correctly concluded that the terms and conditions of the said section 7(ii) have been duly complied with by the plaintiff. As stated by the learned judge: B

> 44. Saya mendapati plaintif telah, pada setiap masa material, mematuhi kesemua terma dan syarat yang ditetapkan dalam seksyen 7(ii). Defendan juga telah mematuhi apa yang perlu dibuatnya di bawah seksyen 7(ii) itu. Berdasarkan dokumen-dokumen dalam kes ini adalah jelas bahawa tiada fakta yang dipertikaikan atau patut dipertikaikan. Plaintif telah pun menjualkan hartanah tersebut kepada pihak ketiga atas persetujuan defendan apabila kedua-dua pihak menjalani proses ditetapkan dalam seksyen 7(ii). Proses yang ditetapkan adalah yang telah dipersetujui bersama oleh plaintif dan defendan dan mengikat kedua-duanya. C D

[36] The said section 7(ii) provides that in the event the landlord desires to sell the said property the tenant shall be given the first option in writing valid for 14 working days to purchase at the price offered by the prospective purchaser to the landlord. E

[37] In relation to this, it is observed that by letter dated 21 September 2011 the plaintiff had notified the defendant of the plaintiff's intention to sell the said property. The plaintiff had also in the same letter notified the defendant that it received an offer from a prospective purchaser to purchase the property for a consideration of RM35,784,320. F

[38] It is not a disputed fact that vide letter dated 6 October 2011, the defendant's solicitor's had responded to the plaintiff's letter and informed the latter that the defendant did not wish to exercise the option to purchase the said property at the offered price. G

[39] As observed by the learned judge, the defendant did not dispute or object to the plaintiff's reliance on the said section 7(ii) to sell the said property which under the said section would result in the termination of the tenancy agreement. H

[40] Subsequently, the facts showed that the plaintiff entered into a sale and purchase agreement on 9 May 2012 with one LSS Academy Sdn Bhd to sell the said property for RM 35,784,320. By letter dated 10 May 2012 the plaintiff's solicitors informed the defendant's solicitors about the proposed sale and purchase agreement and that pursuant to the said section 7(ii) the defendant I

was given six months notice to vacate the said property. In the event vacant possession was not delivered within the six months period, rental at a rate not exceeding 15% of the prevailing rental, that is RM52,900 plus RM7,935 totaling RM60,835 was to be paid for the ensuing six months.

[41] Significantly, as observed by the learned judge:

> Tidak ada bantahan daripada defendan bahawa penamatan ini tidak wajar kerana ia berhak untuk memperbaharui penyewaan untuk kali kedua di bawah Perjanjian Penyewaan itu kerana telah memberikan notis pembaharuan bertarikh 8.9.2011 untuk memperbaharui penyewaan (sila rujuk surat Tetuan Jeff Leong, Poon & Wong bertarikh 10.4.2013 di ekshibit N-11).

[42] Based on the plaintiff's solicitor's letter dated 10 May 2012 we note that the duly executed and stamped copy of the sale and purchase agreement dated 9 May 2012 ('exh N8') was forwarded to the defendant's solicitor. As requested by the defendant and in keeping with the requirements of section 7(ii), the plaintiff had incorporated in exh N8 a pre-condition that LSS Academy will comply with the additional six months extension.

[43] The facts show that there was no reply to the abovementioned letter and the defendant did not deny receipt of the plaintiff's solicitor's letter of 10 May 2012.

[44] In the light of the above the learned judge was not wrong in concluding that the plaintiff had complied with the terms of the said section 7(ii) and hence cannot be said to have signed the sale and purchase agreement with the intention of chasing the defendant out of the premises before the lapse of the tenancy period as alleged.

[45] The learned judge in our view was not wrong in stating that the effect of the sale of the property under section 7(ii) is to put an end to the tenancy agreement. This can be seen from the termination clause in article 8 read together with section 7 of the Third Schedule of the said agreement. Section 7 of the Third Schedule sets out the circumstances under which the second tenancy agreement may be terminated and they are as follows:

> (i) Either party is entitled to terminate the tenancy after the expiry of each (3) year period and the Landlord may terminate this Agreement provided the Tenant is in breach of its covenants and for the terms and conditions of the Tenancy Agreement.
>
> (ii) In the event the Landlord desires to sell the said property, the Tenant shall be given the first option in writing valid for fourteen (14) working days to purchase at the price offered by the prospective purchaser to the Landlord and thereafter should the Tenant refuse to purchase for whatsoever

> reasons, then the offer shall be given to any parties that may meet the price offered. In the event the Landlord decides to sell the said property, the Landlord shall give six (6) months notice to the Tenant and as soon as practical furnish a copy of signed and stamped copy of Sale and Purchase Agreement to the Tenant's solicitors. The Tenant shall continue paying the rental then prevailing for the first six (6) months of the notice and thereafter for the remaining six (6) months, or part thereof, pay to the Landlord a rental not exceeding 15% more than the prevalent rental and the Landlord shall guarantee to the tenant by making a pre-condition in their Sale and Purchase Agreement with the prospective buyer will comply with the additional six (6) months extension.

[46] The fact that the defendant had been granted a second renewal of the tenancy agreement does not preclude the plaintiff from exercising its right to sell the said property under the said section 7(ii) as the defendant is given the first option to purchase the said property at the price offered by the prospective purchaser. If the defendant chose not to exercise that option as they have clearly and unequivocally stated in their letter of 6 October 2011, then the mechanism set out in the said section 7(ii) leading to the eventual dispossession (of the said property) and termination of the said agreement will be triggered.

[47] The defendant cannot now, after relinquishing its right to purchase the said property and after urging the plaintiff to proceed with the sale, with full knowledge of its implications as set out in the said section 7(ii), turn around *volte face* as it were and allege that their tenancy expires on 19 January 2015 and not on 9 May 2013 as stated by the plaintiff in their letter of 16 November 2012.

[48] Further there is nothing in the second tenancy agreement (and the defendant has not shown to the court nor stated in their aforesaid letter of 16 November 2012 any relevant clause in the said agreement to that effect) which prevents the plaintiff from exercising its right under the said section 7(ii) to sell the said property.

[49] The fact that the defendant did not dispute the plaintiff's right to do so is evident from the contents of their letter of 6 October 2011, when, after affirming that the plaintiff can proceed with the proposed sale, the defendant reminded the plaintiff of the need to comply with the precondition in the said section 7(ii) in the event that the plaintiff proceeds to sign the sale and purchaser agreement with the prospective purchaser.

[50] The defendant was therefore fully aware that once the sale is proceeded with, then by virtue of the said section 7(ii) they would have to vacate the said

property at the end of the extended six months period after the initial six months notice; which means that by that period the tenancy is effectively terminated.

[51] That being the legal and factual position based on the terms of the second tenancy agreement and the relevant correspondence exchanged between the parties as set out above, the defendant's letter of 10 April 2013 contending otherwise was, in our view, nothing short of an afterthought.

ESTOPPEL

[52] On the issue of estoppel as the defendant did not vacate the said property by 9 November 2012, the plaintiff had increased the rental payable by 15% from RM52,900 – RM60,835 for the ensuing six months as provided for under section 7(ii). At the risk of repeating ourselves the increase in rental was paid by the defendant pursuant to the plaintiff's exercise of its right under the said section 7(ii).

[53] In view of that we concur with the plaintiff's submission that having agreed to and having paid the said 15% increase in rental the defendant is now estopped from challenging the validity of the plaintiff's solicitor notice dated 10 May 2012 and/or contending that the tenancy is valid up to 19 January 2015 or 17 January 2018 (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283).

[54] We also agree with the learned judge's finding that the defendant's averment that the sale and purchase agreement dated 9 May 2012 was not lawfully made by the plaintiff with LSS Academy Sdn Bhd because until now the property is still registered in the name of the plaintiff as stated in the title search is without merit.

[55] As submitted by the plaintiff's solicitor the fact that the said property is still registered in the name of the plaintiff is because cl 1(c) of the sale and purchase agreement dated 9 May 2012 requires the purchaser to pay the balance of the deposit of RM2,862,745.60 within seven days from the date of delivery of vacant possession of the said property by the vendor (ie the plaintiff) to the purchaser. As the defendant had failed, refused and/or neglected to deliver vacant possession of the said property by the requisite date that is 9 May 2012, the plaintiff could not in the circumstances, deliver vacant possession of the said property to the purchaser and hence the condition precedent set out in cl 1(c) and (d) of the sale and purchase agreement dated 9 May 2012 cannot be said to have been complied by the plaintiff. It thus follows that the purchaser cannot yet be registered as the owner of the subject property.

[56] We find no reason therefore to disagree with the learned judge's finding that the defendant's failure to vacate the said property has occasioned a loss to the plaintiff, which has to be accounted for by the defendant and be paid by the defendant.

[57] In the circumstances, we are satisfied that there are no substantial issues of fact that are disputed and that this was a fit and proper case to be summarily determined by the High Court under O 14A of the ROC 2012.

[58] For the above reasons we unanimously found that the learned judge did not misdirect herself in law in disposing of this matter by way of O 14A.

[59] With regard to the counterclaim we agree with the learned solicitor for the plaintiff that upon the determination of the questions on the construction of the relevant clauses of the tenancy agreement and on the issue of estoppel, it follows that the counterclaim can no longer subsist.

[60] For purposes of clarity however we hereby order that the counterclaim stands dismissed. Accordingly we hereby dismiss the appeal with costs of RM10,000 to the plaintiff. The deposit to be refunded.

Appeal dismissed with cost of RM10,000.

Reported by Kohila Nesan